UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

DAY & ZIMMERMANN, INC.

and **Case 17-CA-22229**

UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL NO. 254

Lyn R. Buckley, Esq., Overland Park, KS, for the General Counsel.
LeRoy Autrey, Esq., Texarkana, AR, for the Respondent.
John Sharp, Parsons, KS, for the Charging Party.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Parsons, Kansas on October 28 and 29, 2003. United Government Security Officers of America, Local No. 254 (the Union or the Charging Party), filed an original and amended unfair labor practice charge in this case on May 23 and July 22, 2003, respectively.[1] Based on that charge as amended, the Acting Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint on July 25. The complaint alleges that Day & Zimmermann, Inc.[2] (the Respondent or the Employer) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

[1] All dates are in 2003 unless otherwise indicated.

[2] At the hearing, counsel for the General Counsel amended all the formal papers to reflect the correct name of the Respondent. The parties stipulated that the correct name of the Respondent is Day & Zimmermann, Inc.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is a corporation with a place of business in Parsons, Kansas (herein called the facility), where it has been engaged in the production of bombs for defense contractors. Further, I find that during the 12-month period ending June 30, 2003, the Respondent, in the course and conduct of its business operations, purchased and received at its facility goods and services valued in excess of $50,000 directly from points located outside the State of Kansas.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The General Counsel alleges, the Respondent admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.[4]

III. Alleged Unfair Labor Practices

A. The Issues

In substance, the complaint alleges that the Respondent issued a written warning to and suspended Union President Bryan Good because of his union and protected concerted activity, and because the Union filed unfair labor practice charges with the Board. It is also alleged that the Respondent's agent and supervisor Don Taylor made several threats to discipline employees because of the Union's action in filing charges with the Board. Good was issued a written warning allegedly for getting his Company vehicle stuck in the snow, and he was suspended allegedly because he fell asleep while on security patrol. However, the General Counsel contends that in both instances Good was treated in a disparate fashion, and that the real reason for the Respondent taking disciplinary action against Good was due to his union and protected concerted activity and because charges had been filed with the Board.

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[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[4] At the hearing, counsel for the General Counsel moved to amend the complaint to allege that the Union is a labor organization within the meaning of the Act. I granted the unopposed amendment.

The Respondent denies the commission of any unfair labor practices. It is the Respondent's position that it has had an amicable long-term relationship with numerous labor organizations, and that it harbors no union animus toward the Charging Party or Good. The Respondent contends that Good was twice disciplined for cause, with no nexus to his union or protected concerted activity or because the Union filed charges with the Board. Further, it alleges that Good's discipline was distinguishable from other situations where employees were either not disciplined or were disciplined less severely. The Respondent denies that Good was treated in a disparate fashion.

B. Facts and Analysis

1. Background

The Respondent has operated an ammunition Plant in Parsons, Kansas for the United States Army since 1970. The entire facility is about 14,000 acres in size, or approximately seven miles by five miles in dimension. It contains approximately 100 miles of paved roads, plus addition miles of gravel roads, dirt roads, and trails.[5] At various times, the Respondent's employees were represented by as many as seven separate labor unions. The contracts negotiated between the Respondent and the various unions have typically contained an agency shop agreement, under which bargaining unit employees were required to have the equivalent of monthly union dues deducted and remitted to their respective unions. Kansas, which is a right to work state, does not permit such a union security clause. However, the Respondent has historically taken the position that the facility is located within a "federal enclave," where state right to work law does not apply.[6]

Bryan Lee Good is a security guard at the Respondent's facility. He has been employed in that capacity for the past six years. According to Good, the duties of a security guard at the facility include patrolling an assigned area, visually and physically inspecting the buildings housing the explosives, checking the entrances and exits to the facility, watching for strangers and trespassers, being alert for fire danger, and reporting anything unusual. Normally a guard performs his duties from an assigned company vehicle. Prior to November 6, 2002, the Respondent's guards were represented by the International Union, United Plant Guard Workers of America (UPGWA), Local No. 253 (hereinafter referred to as the old union). On November 6, 2002, a representation election was held by the National Labor Relations Board, and the current Union/Charging Party was selected by the guards as their new collective bargaining representative.[7]

Good testified that he was elected president of the old union local on February 2, 2002, and that he retained the position of president after the selection of the Union as the new collective-bargaining representative. According to Good, the old union was not aggressive enough in representing the guards, which was the primary reason why the guards decided to change representatives. Good was in favor of the switch, and he served as the observer for the Union/ Charging Party at the representation election.

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[5] This information is from the testimony of Donald Taylor.

[6] This information is from the testimony of Tommey McLarty. Also see Res. Exh. 20.

[7] The parties stipulated as to the name of the old union, and the date of the Board election in which the Charging Party was selected by the guards as their new representative.

Donald James Taylor is the Supervisor for Plant Protection, which includes both the guard department and the fire department. He has worked for the Respondent since approximately 1985, and was formerly a guard and a member of the old union. During the time of the events in question, there were approximately 20 employees in the guard department, 15 of whom were rank and file guards. On September 26, 2002, the Respondent posted a notice on the bulletin board in the guard office, which read as follows: "Until further notice: Do not drive on dirt/gravel roads that are not being properly maintained. The only exception would be an emergency situation making such travel mandatory." (Res. Exh. 1.) According to Taylor, the Army, which was responsible for maintaining the roads on the facility, had become somewhat lax in performing its maintenance duties. In an effort to avoid excessive damage to its vehicles, the Respondent instituted the policy against driving on those roads not being properly maintained. Taylor testified that some dirt/gravel roads are maintained, while others are not.

According to Taylor, on December 24, 2002, the facility received 8-10 inches of snow, with drifts. The guards were assigned four-wheel drive vehicles that day because of the difficult driving conditions. Normally, the guards are expected to physically check the doors, windows, and perimeter of a building by getting out of their vehicles and physically pulling on the doors and windows to ensure that the building is secure. Taylor testified that on this date the guards were instructed to perform the full "physical pulls" and checks, if possible. However, if they were unable to complete the physical pulls because of the snow conditions, they were excused from doing so.

Bryan Good was instructed to patrol the "300 area" on December 24, 2002, which would normally include physical pulls and checks of the doors, windows and locks on the buildings in the 300 area.[8] While on patrol, Good's vehicle got stuck in the snow next to building 315 and had to be towed out. He was given a written reprimand for this incident, which reprimand was issued on January 8, 2003. (Res. Exh. 3.) The reprimand indicates that Good "drove his vehicle off of the roadway and got it stuck in the snow." Further, it states that he "has been instructed not to drive vehicles off of the roadway." Specifically, Good was charged with "unsatisfactory work performance" as defined in the Respondent's "Employee Information Manual." (Res. Exh. 4, p. 27.) It was Donald Taylor's decision to issue the reprimand. He justified it on the basis that Good had not followed the instructions posted on September 26, 2002 (Res. Exh. 1.), and had driven his vehicle onto a drive way, which was not being maintained, causing it to become stuck in the snow. Taylor distinguished Good's action from that of other guards who had also gotten vehicles stuck, testifying that these other guards had not driven onto non-maintained roads, following the prohibition in the posted notice not to do so.

Good testified that he was simply performing his assigned duties on December 24, 2002, and was making a physical pull at building 315 when he misjudged the depth of the snow and got stuck. He contends that other guards had on occasion become stuck requiring that they be towed free, without the Respondent issuing them any discipline. Taylor does not deny that Good was performing his duties when he became stuck. However, he contends that Good was excused from making the physical pulls that day because of the snow. Further, Taylor notes that had Good felt it necessary to make the physical pulls, he could have parked his truck on a

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[8] The facility is divided into numerous areas and marked numerically for reference by the Respondent, the Army, and contractors. Maps of the facility produced by the Respondent contain these references, as well as roads, buildings, and natural features found in the various areas. (Res. Exh. 7-8.)

maintained road surface approximately 35 feet from the building and walk over to the site. By parking his truck next to the building, Good was avoiding the walk, but allegedly violating the Respondent's posted policy against driving on a non-maintained roadway.

On another issue, Taylor testified that he has told the guards that if they "bring a pillow and intend to go to sleep," and are found sleeping that they will be disciplined. Further, he has informed the guards that while it is "not acceptable," that if they simply "nod off and wake back up," that he "will understand." According to Taylor, guards will on occasion nod off and if it is inadvertent, there will be no discipline. It would appear that Taylor makes a distinction between a guard who intends to sleep and prepares to do so, including avoiding detection, and a guard who unintentionally succumbs to fatigue and falls asleep. A number of guards, including Good testified that they were aware of Taylor's policy and the distinction that he was drawing.

The Respondent's fire department is responsible, among other matters, for managing the fire danger at the facility by creating "controlled burns" to eliminated vegetation, which could serve as fuel for an uncontrolled fire. Danny Webb is the Lieutenant in the guard department, essentially a supervisory position reporting directly to Taylor. He has worked in the guard department for over 19 years. Webb and Taylor both testified that on April 14, 2003, they drove together while Taylor checked on a controlled burn, which the fire department had created four days earlier.[9] At one point they were on a gravel road that they described as a non-maintained roadway. This road ran behind one of three old rock quarries, which were filled with water, creating ponds sometimes used by fisherman.[10] On the Respondent's reference maps, the area just north of the quarries is referred to as the 1200 area. (Res. Exh. 7-8.)

As Webb and Taylor drove behind the quarry at about 2:15 p.m., they saw a guard vehicle sitting in the roadway. They stopped their truck approximately 15 feet behind the guard vehicle and observed a guard asleep behind the steering wheel. Taylor recognized the guard as Bryan Good and he directed Webb to approach Good and wake him up. According to Webb, the guard vehicle engine was running with the windows in the up position. Webb approached the vehicle from the driver's side and waved has hands at Good, but got no response. Next, Webb knocked on the window, at which point Good acknowledged Webb's presence. Webb testified that Good had been "in a kind of a reclined position," and when Webb knocked on the window, Good "reached up and grabbed the wheel and straightened himself up and rolled the window down." Good commented that he was on a break, and asked Webb what he and Taylor were doing. Webb responded that they were checking on a controlled burn. Webb recalled Good mentioning that he had been watching some turkeys. The conversation apparently ended with Webb telling Good that he "probably would get some time off," and should move along. The reference to "time off" was apparently intended to suggest that Good would likely be suspended for being asleep. In any event, Webb testified that Good did not question the comment, other than to again say that he had been on a break, and then drove away. Taylor's testimony was similar to Webb's, with the addition that Taylor claimed that when they first saw Good asleep in his vehicle, he had "his head up against the back glass."

Good admitted on cross-examination that he had not been instructed specifically to go to the quarry area, but he seemed to suggest that his normal patrol duties required that he check for residual fire danger from the recent controlled burn. He denied that he was "hiding" in the

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[9] It should be noted that Taylor apparently mistakenly testified on a number of occasions that the controlled burn was the day before his inspection trip with Webb.

[10] The publics' access to the quarries is restricted to specific hunting and fishing seasons as provided for under the laws of the State of Kansas.

quarry area, but admitted that he had "nodded off." He contended that he had not intended to fall asleep, but that he has "a boring job," and that nodding off sometimes happens. Also, he indicated that Taylor and Webb stopped their vehicle approximately "40 yards" behind him. By this reference, he is apparently suggesting, without specifically saying so, that the supervisors were attempting to sneak up on him and catch him sleeping.

Taylor testified that Good had no business being on a non-maintained road in "a very brushy, dense area," and he indicated that in his opinion Good was hiding in an effort to sleep without being detected. Taylor recommended that Good be suspended for sleeping on the job. However, when a supervisor recommends disciplinary action, which may result in a loss of pay, the recommendation must first be approved by the Respondent's Director of Industrial Relations. Tommey McLarty was, at the time of Good's suspension, acting in that capacity. McLarty was a long-term employee of the Respondent who had formerly been in that position from 1978 until his retirement in April 1996. He had been brought back from retirement in April 2001, as a labor consultant for contract negotiations, and had also been acting as the I.R. Director in the absence of a regular director.

According to McLarty's testimony, he approved the 40-hour suspension for Good after being advised of the incident and Taylor's recommendation. (Res. Exh. 5.) He indicated that the disciplinary action for sleeping on duty has remained the same for 20 years, namely a suspension of 40 hours, with a corresponding loss of pay. McLarty cited to the Respondent's Employee Information Manual, group II, section 2.6 "Sleeping on duty" (Res. Exh. 4.), which provides as the "standard penalty" 40 hours loss of pay. Further, in an effort to support his testimony, McLarty offered "a log for group 2.6 violations," which log is retained by the personnel office on a regular basis. (Res. Exh. 18.) This log spans the period from July 1981 to April 2003, and appears to show that those employees found sleeping on the job in violation of 2.6, with no prior violation of this provision, were all suspended for 40 hours. Of course, the General Counsel argues that Good was not really sleeping, but had merely "nodded off," and was treated in a more sever, disparate fashion than other employees who merely nodded off. Interestingly, McLarty testified that until this incident arose, he had been unaware that Taylor made a distinction between employees who had intentionally been sleeping on the job and those who had inadvertently nodded off. Where Taylor was taking disciplinary action against an employee less severe than suspension, the matter would normally not be submitted to the I.R. Director for approval.

On April 21, 2003, the Respondent issued to Good a 40-hour suspension for sleeping on the job. (Res. Exh. 5.) Taylor had Good come to his office where, in the presence of Webb and Union Vice-President Tom Lindsey, he informed Good of the suspension for sleeping on duty. By all accounts, Good did not take the news well. According to Taylor, Good "started cussing," saying Taylor was a "no good son of a bitch," and a no good "asshole." Taylor told Good he had heard enough, and issued the suspension. Good allegedly responded by saying that he would sue Taylor and the Respondent. Webb testified that Good called Taylor a "no good asshole" and a "lair," after which Taylor told Good to conduct himself in a more professional manner. According to Good, after hearing of the suspension, he reminded Taylor of an incident with guard Robert Snow who was allegedly caught sleeping and not suspended. At first Good told Taylor he must be "joking," but he admitted that ultimately he called Taylor "a no good s.o.b.," after which the conversation ended.

It should be noted that no disciplinary action was taken against Good as a result of the profane language directed at Taylor. Also, the Union never filed a grievance on behalf of Good alleging his suspension as a violation of the collective-bargaining agreement between the parties.

John David Sharp is a guard and Vice-President of the Union. He has been employed by the Respondent for 19 years. He testified that in late June or early July 2003, he had a conversation by telephone with Taylor, during which Taylor mentioned that he was going to "write up" Good for failing to report a barrel which was left unattended on a roadway. Sharp asked Taylor to talk with Good about being more observant, rather than issuing a written warning to him. Allegedly, Taylor responded saying, "there were Labor Board charges filed, that he had to write everybody up, and that if the Labor Board charges hadn't been filed then he wouldn't have to write everybody up." Further, he said, "we were forcing him to write everybody up because of the Labor Board charges."[11] According to Sharp, about a week later in another telephone conversation, Taylor mentioned having to write up guard Kathy Heater for failing to call or show up for work. Allegedly, Taylor said that he had written up another guard for the same conduct and, so, he had no choice but to treat Heater the same way, "as he had the Labor Board charges on him, and he had to be fair to everybody in the write ups." Sharp agreed that Taylor must be fair, but reminded him that each case involved different circumstances. In any event, when Taylor testified, he did not deny the substance of either of these conversations with Sharp.

Glen Allen is a guard who has been employed by the Respondent for 19 years. He testified that in early summer 2003 he had a conversation with Taylor, who told him that he "had written Kathy Heater up that day and that he was going to have to write up all the security personnel because of the Labor Board charges that had been filed." Allen responded by saying that he "hated to see that get started." Again, when Taylor testified he did not deny the substance of this conversation with Allen. The General Counsel is apparently taking the position that the comments made by Taylor to Allen and Sharp about "Labor Board charges" were references to the Union's first charge alleging disparate treatment of Good, which charge was filed on May 23, 2003. (G.C. Exh. 1-A.)

Finally, It must be mentioned that paragraph 5(d) of the complaint refers to an unfair labor practice charge filed by the Union on February 20, 2003, in Case 17-CA-22109. However, counsel for the General Counsel failed to offer a copy of that charge into evidence in this proceeding. Further, while there was some general testimony from several witnesses about bad faith bargaining or unilateral change charges filed by the Union against the Respondent during the negotiation of the current collective-bargaining agreement, no evidence was offered connecting these general comments with the above case number. The current contract between the parties was executed on May 20, effective retroactively to May 1. (Res. Exh. 20)

2. The Written Warning

Paragraph 5(a) and (c) of the complaint alleges that the Respondent issued the written warning to Good on January 6, 2003,[12] because of his union and protected concerted activity. As noted above in detail, this was the warning issued to Good because he got his vehicle stuck in the snow on December 24, 2002. The General Counsel's case is based on the premise that the Respondent, and Taylor in particular, was upset with Good because he had been active in replacing the old union with the current Union. However, in my view, counsel for the General Counsel never offers a coherent, reasonable theory as to why the Respondent cared one way

[11] Apparently, Taylor never issued a written reprimand to Good for failure to report the wayward barrel, but did as Sharp requested and merely spoke with Good about the matter.

[12] The evidence establishes that the written warning was actually issued on January 8, 2003. (Res. Exh. 3)

or another about which union represented its guard employees. There were suggestions from a number of witnesses on behalf of the General Counsel that the Union/Charging Party was more active in the filing of grievances and unfair labor practice charges than the old union. Still, this would seem a rather minor difference when placed in context.

The Respondent has a long time, well-established collective-bargaining relationship with a number of unions representing its employees at the facility. McLarty testified without contradiction that from 1978 until his originally retirement in 1996, the Respondent negotiated successive contracts with as many as seven separate unions representing its employees. Further, each of the contracts contained a union security clause, even though such provisions were unlawful under the Kansas right to work laws. The Respondent affirmatively took the position that as the facility was a "federal enclave," the State law did not apply. As a result, all of the Respondent's represented employees were required to contribute financially to their respective unions. Clearly, this was not the action of an anti-union employer. To the contrary, this was the conduct of an employer, which had come to terms with the unions representing its employees. This was an employer that historically had a long amicable relationship with organized labor.

In my opinion, the General Counsel has "grasped at straws" in an attempt to establish union animus. In this effort, Good testified that during the period when the Union was being selected as the new collective-bargaining representative for the guards, he filed grievances on behalf of guards Gerald Tice and Kathy Heater. Allegedly, in response to the Tice grievance, Taylor told Good that if the grievance were successful in getting Tice reinstated that the Respondent would "have to lay off Kathy Heater." As Taylor does not deny making this statement, I must assume he said the words alleged. However, what did he mean? Kathy Heater's grievance had to do with the Respondent's refusal to waive her probationary period and pay her a higher starting salary, as had apparently been done for other guards. Therefore, it would seem to me that Taylor was making reference to having to lay off a newly hired guard with low seniority (Heater), if the Respondent were required to rehire a guard discharged for falsifying records (Tice) and, so, be overstaffed. Under the circumstances, that interpretation seems more reasonable than the General Counsel's contention that the statement was a veiled threat to punish Heater, because Good had filed a grievance on behalf of Tice.

Good testified that a day or two later, Taylor repeated his statement that if Tice were reinstated, Heater would be laid off. Allegedly, Taylor further told Good that if Tice were reinstated, "it is going to be very rough for you. It is going to be hard." Once again, as Taylor did not deny the statement, I will assume he said the words. However, I find the statement ambiguous at best. It is certainly too ambiguous to warrant a finding that Taylor was making a threat against Good because of the Tice grievance. It may well have been that Taylor was suggesting that if Heater were laid off because Tice was reinstated, that the guards would be upset with Good. In view of the Respondent's over 20 year history of amicable relations with its employees' unions, it is simply not reasonable to conclude that the Respondent was exhibiting union animus based on only one ambiguous statement by Taylor.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action

would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has not made a *prima facie* showing that Good's union and protected concerted activity was a motivating factor in the Respondent's decision to issue a written warning to him on January 8, 2003. In *Tracker Marine, L.L.C.*, 337 NLRB No. 94 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place, even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

There is no doubt that Good had been engaged in substantial union and protected concerted activity. Since February 2002, he had been President of the labor organization representing the guards, first the old union, and after November 6, 2002, the Charging Party/Union. Good's unrebutted testimony established that he actively supported the change in bargaining representatives, and was the observer for the Union at the representation election held by the Board on November 6, 2002. Further, he obviously filed grievances on behalf of a number of guards, including Tice and Heater. Also, starting in January 2003 and continuing into May 2003, Good actively participated on the Union's committee negotiating a new collective-bargaining agreement with the Respondent. He testified that at times the negotiations had "a few bumpy spots." Good mentioned one incident in particular where he and the Respondent's chief negotiator, Tommey McLarty, became rather heated, and a recess was needed to calm them down.

Knowledge of Good's union and protected concerted activity is also not in doubt. Obviously, the Respondent was aware that Good occupied the position of President of both of the guards' unions, was the Charging Party/Union's observer in the representation election, and supported the effort to change the collective bargaining representative. The Respondent was also aware that Good filed grievances on behalf of various employees and was an active participant in the contract negotiations.

Good clearly sustained an adverse employment action. He was issued a written warning on January 8, 2003, for "unsatisfactory work performance." (Res. Exh. 3.) The violation having occurred on December 24, 2002, when Good's company vehicle became stuck in the snow. The warning indicated on its face that further violations of the Respondent's rules could result in suspension and even discharge.

Regarding the question of whether there exists a link or nexus between Good's union and protected concerted activity and the issuance of the written warning, I am of the view that the General Counsel has failed to establish such a connection. There is an absence of the kind of union animus on the part of the Respondent as would serve as that link or nexus to the discipline. Contrary to Good's suggestion and the General Counsel's theory, there is a total

absence of any evidence as would establish that the Respondent opposed the guards' effort to change collective-bargaining representatives. McLarty testified that the Respondent did not challenge or object in any way to the election petition or the proposed unit. There is no credible evidence that the Respondent was at all interested in which union represented its guards.

As an indication of the Respondent's lack of animus toward the Union, it should be noted that shortly after the representation election on November 6, 2002, the Respondent proposed to Good, as the representative of the newly certified Union, that the guards receive an increase in pay of one dollar per hour. This raise was intended to adjust the guard's salary to the level it would have been at had the guards not refrained from receiving prior wage increases for a three year period in order to make the Respondent's contract with the Army economically competitive. Equally significant, the Respondent negotiated with the Union over the terms of a new collective-bargaining agreement, which contract was executed on May 20, 2003, effective retroactively to May 1, 2003, and contained a union security cause. (Res. Exh. 20.)

These were clearly not the actions of an anti-union employer. To the contrary, they were the actions of an employer that had a long, well established history of dealing with the unions representing its employees in a professional and amicable way. I have seen no credible evidence that the Respondent treated the Union and its supporters, including Good, any differently than it had previously treated the old union and its supporters.

Having failed to establish animus by the Respondent toward Good because of his union or protected concerted activity, the General Counsel has also failed to connect the disciplinary action taken by the Respondent with Good's protected activity. It follows, therefore, that the General Counsel has failed to meet her evidentiary burden and make a *prima facie* showing that Good's protected activity was a motivating factor in the Respondent's decision to issue him a written warning. However, even assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have issued Good a disciplinary warning, even absent his protected activity.

As is set forth in detail above, Good's company vehicle was stuck in the snow and had to be towed free on December 24, 2002. He drove the vehicle onto a non-maintained driveway after being told by the dispatcher that if he could not make full physical pulls that day because of the snow conditions, the pulls could be waived. However, instead of parking the vehicle on a maintained road and walking to the building to make his pulls, or omitting the pulls as informed he could do, Good drove into the deep snow and got stuck.

These facts are not really in dispute. To the extent that there may be minor differences between Good's version and that told by Taylor, I credit Taylor. Between the two men, Taylor seemed to be the more dispassionate and objective. Good was clearly more emotional, both when testifying and when observing the proceedings as a witness. After seeing his actions on several occasions, the undersigned had to admonish Good not to make hand or facial gestures denoting disagreement or displeasure when witnesses on behalf of the Respondent were testifying. This is not to suggest that Good was intentionally untruthful, only that I believe his emotions caused him to view certain events in a somewhat distorted fashion. Good seemed to recall events is such a way as to cast himself in the best possible light. For these reasons, I find Taylor's testimony more accurate and credible.

Much of the General Counsel's case is based on the contention that Good was treated in a disparate fashion. Allegedly, other guards also got stuck and had to have their vehicles towed free. However, those incidents occurring prior to September 26, 2002, are not analogous, as it was not until that date that the Respondent had the notice posted in the guard headquarters

directing that vehicles not be driven on "roads that are not being properly maintained." (Res. Exh. 1.) One notable exception concerned guard Paul Cadwallader, whose vehicle slid off a snowy roadway during an evening in mid-January 2003. Both Cadwallader and Taylor testified about this incident. While not completely clear to the undersigned, it appears that at the time of the event, Cadwallader was on a maintained road, and that was the information Taylor received. Also, several employees apparently pushed the vehicle back onto the roadway, without the tow truck having to be called. Thus, there is some distinction with the Good incident, which occurred on a non-maintained roadway and required a tow truck to free the vehicle. Cadwallader was not disciplined for this incident.[13] As there was a significant difference between the two events, I do not believe that disparate treatment has been established. The Board has held that disparate treatment sufficient to support a finding of a violation of the Act must be "blatant," in that it must involve "a plain failure by the employer or its supervisors or managerial agents to treat equally-situated employees equally." *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998). I do not view the Cadwallader incident as anything approaching a "blatant" example of disparate treatment toward Good. Further the General Counsel has not demonstrated any other examples of alleged unequal treatment as would establish that the reasons given for issuing a written warning to Good were pretextual.

It is important to note that the complaint does not allege any independent violation of Section 8(a)(1) occurring prior to the incident in question. The Board has held that the absence of any evidence that an employer has interfered with protected activity strongly supports the conclusion that the employer's alleged reason for the disciplinary action is not pretextual. *Taos Ski Valley, Inc.*, 332 NLRB 403 (2000).

I am convinced that the Respondent would have issued the written warning to Good because he violated company policy, drove on a non-maintained roadway and got his vehicle stuck in the snow, even in the absence of Good's union and protected concerted activity. See *Yokohama Tire Corp.*, 303 NLRB 337, 338 (1991). The Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision to discipline Good, even without any protected activity. See *T & J Trucking Co.*, 316 NLRB 771 (1995).

In summary, I find and conclude that counsel for the General Counsel has failed to establish a *prima facie* case that protected conduct was a "motivating factor" in the Respondent's decision to issue a written warning to Good. Further, I find that assuming the evidence is viewed as having established a *prima facie* case, the evidence still supports a finding that the Respondent would have disciplined Good, even in the absence of his union and protected concerted activity. Accordingly, I shall recommend that complaint paragraph 5(a) and, to the extent that it relates to it, 5(c) be dismissed.

3. The Suspension

It is alleged in complaint paragraph 5(b), (c), and (d) that the Respondent issued to Good a 40-hour suspension on April 21, 2003, because of his union and protected concerted activities, and because the Union filed an unfair labor practice charge with the Board in Case

[13] It is worth noting that Cadwallader did not escape disciplinary action for long, as he was subsequently issued a written warning for damaging a vehicle by driving over a gate stop (Res. Exh. 11.), and ultimately reassigned from driving duties because of multiple accidents involving animals.

17-CA-22109.[14] The specific events leading up to the suspension have been set forth in detail above. For the most part, the facts surrounding the incident where Taylor and Webb discovered Good asleep in his vehicle on April 14, 2003, are not in dispute. To the extent that there are minor variances between Taylor and Good's versions, I will credit Taylor for the reasons I expressed earlier in this decision. Also, Webb' s testimony tends to support Taylor.

Applying the standards and factors as set forth by the Board in *Wright Line, supra*; and *Tracker Marine, supra*, I conclude that the General Counsel has failed to establish a *prima facie* case that Good's union and protected concerted activity were a motivating factor in the Respondent's decision to suspend him. As noted and detailed above, there is no doubt that Good was engaged in significant union and protected concerted activity. Further, there is no doubt that the Respondent was well aware of Good's protected activity. Of course, the 40-hour suspension was clearly an adverse employment action. (Res Exh. 5.) Although not specifically noted on the written discipline report, the Respondent's Employee Information Manual makes it clear that a further incident of sleeping on duty could lead to discharge. (Res. Exh. 4.)

Regarding the question of whether there exists a link or nexus between Good's protected activity and his suspension, I have already indicated in detail above my conclusion that there is an absence of animus in this case as could establish the requisite link. As noted, I see no probative evidence that the Respondent was particularly interested in which union represented its guard employees, or was concerned with Good's union or protected concerted activity. Rather, the evidence shows that the Respondent had a long history of amicable relations with whichever unions represented its employees. The General Counsel has offered insufficient evidence to demonstrate that the Respondent has changed its pattern of behavior when dealing with Good or the Charging Party/Union.

Having failed to establish animus by the Respondent toward Good because of his union or protected concerted activity, the General Counsel has also failed to connect the disciplinary action taken by the Respondent with Good's protected activity. It follows, therefore, that the General Counsel has failed to meet her evidentiary burden and make a *prima facie* showing that Good's protected activity was a motivating factor in the Respondent's decision to issue him a 40-hour suspension. However, even assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have suspended Good, even absent his protected activity.

As set forth in detail above, Taylor and Webb caught Good asleep in his vehicle while on duty on April 14, 2003. He was discovered in a remote, bushy, isolated area, on a non-maintained road, behind an old quarry. Despite his denial, it appears obvious to me that Good intentionally chose that location to sleep, because he assumed he was unlikely to be observed. He does not deny "nodding off," but claims that his actions were involuntary and were of the type that Taylor normally excused.

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[14] As noted earlier, counsel for the General Counsel did not offer a copy of this charge into evidence, nor was there any probative testimony specifically indicating the nature of this charge, when it was filed, and its ultimate disposition. Accordingly, there is no evidence of record to support the complaint allegation regarding the Union's filing of this charge, and the General Counsel has failed to meet her burden of proof and establish the alleged Section 8(a)(4) violation. Therefore, I shall recommend that complaint paragraph 5(d) be dismissed.

The General Counsel's theory of the case is based on Good's contention that Taylor treated him in a disparate fashion by suspending him for merely "nodding off." However, I believe that it was reasonable for Taylor to have concluded that what Good did was intentional, and not simply the inadvertent result of fatigue and boredom. For the reasons stated earlier, I credit Taylor over Good, and accept Taylor's assessment that Good had no work related reason to be on the particular road on which he was discovered. Good testified that he was checking on a controlled burn. However, that burn had been conducted three or four days earlier, and he had not been specifically directed to check on the burn. Good denied Taylor's contention that the road on which he was discovered was not maintained. Of course, the condition of the road was somewhat subjective. However, from the description of the area where Good's vehicle was parked, it was certainly reasonable for Taylor to conclude that Good had selected this isolated, bushy, and remote place to avoid detection.

Taylor acknowledged that he had a policy of disciplining guards who intentionally went to sleep on duty, but not those who unintentionally "nodded off." It appears from the testimony of a number of guards that Taylor's policy was well known. The General Counsel contends that Taylor was treated in a disparate fashion, as other guards who nodded off went unpunished. In her post-hearing brief, counsel argues specifically that Robert Snow was twice caught sleeping at his gatepost, but not disciplined. However, this was not inconsistent with Taylor's policy, because Taylor considered that Good had not simply nodded off but, rather, had gone to an isolated area and intentionally gone to sleep. From the credible evidence presented, I believe that it was certainly reasonable for Taylor to come to this conclusion. He caught Good soundly asleep in his vehicle, on a road he had no work related reason to be on, in an area where it would be unlikely for him to be discovered.

I conclude that Taylor's treatment of Good was not inconsistent with his policy of disciplining those guards who had intentionally gone to sleep on duty. The Respondent's Employee Information Manual specifically provided that the penalty for an employee found sleeping on duty was 40 hours loss of pay. This was for a first offense, with a second offense within one year resulting in termination. The Respondent's "violation log" shows that since April 1984, there have been eight guards, including Good, who have been penalized for this offense by being given a suspension.[15] One guard was discharged for a second offense within one year. (Res. Exh. 18.)

Bryan Good was treated just like the other seven guards who had a first offense of sleeping on duty. He was given a 40-hour suspension. I believe that it was certainly reasonable under the circumstances surrounding the incident for Taylor to conclude that Good had intentionally gone to sleep, not simply nodded off. Also, Taylor's willingness to ignore Good's profane language direct toward him when he presented Good with the suspension on April 21 is further evidence that Taylor was not treating Good in a disparate or more severe way.

In my view, the Respondent's stated reason for suspending Good is not pretextual. It is important to note that I have found no independent violation of Section 8(a)(1) of the Act committed prior to the date of Good's suspension. The absence of any evidence that an employer has interfered with protected activity strongly supports the conclusion that the employer's alleged reason for the disciplinary action is not pretextual. See *Taos Ski Valley, Inc.*, 332 NLRB 403 (2000). I conclude, therefore, that the Respondent suspended Good for 40-

[15] It should be noted that the "violation log" lists the penalty for sleeping on duty as either a 40-hour suspension, or 5-day suspension, presumably 8-hour days. Also, guards are shown as being in either the "IR" or "PP" division. (Res. Exh. 18.)

hours for good cause.[16] Also, I find that the Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision, even in the absence of Good's union and protected activity. See *T & F Trucking Co.*, 316 NLRB 771 (1995).

In summary, I conclude that counsel for the General Counsel has failed to establish a *prima facie* case that protected conduct was a "motivating factor" in the Respondent's decision to suspend Good. Further, I find that even if the evidence is viewed as having established a *prima facie* case, the evidence still supports a finding that the Respondent would have suspended Good, even in the absence of his protected activity. Accordingly, I shall recommend that complaint paragraph 5(b) and, to the extent that it relates to it, 5(c) be dismissed.

4. The Threats to Discipline

It is alleged in paragraph 4(a) and (b) of the complaint that in the latter part of June 2003, the Respondent, through Donald Taylor, threatened employees with either discipline or more severe discipline than was warranted, because unfair labor practice charges had been filed with the Board. Preliminarily, it is important to place these alleged threats in context. They were made approximately two months after the suspension issued to Bryan Good, and approximately one month after the Union filed the original charge in this case on May 23, 2003.

John Sharp, Union Vice President, testified that in late June or early July 2003, he received a telephone call from Taylor. During that conversation Taylor said he was "going to have to write Bryan Good up for failure to report a barrel" that was apparently left unattended on a roadway. Sharp suggested to Taylor that instead of a "write up," Taylor ask Good to be more observant. Taylor allegedly responded that "now that there was Labor Board charges filed that he had to write everybody up. If the Labor Board charges hadn't been filed then he wouldn't have to write everybody up, but we were forcing him to write everybody up, because of the Labor Board charges." Sharp acknowledged that, in fact, no such written warning was ever issued to Good.

According to Sharp, about one week later, he received a second call from Taylor. Allegedly, Taylor told Sharp that guard Kathy Heater had failed to show up for work or to call in with an excuse. Further, Taylor said that he "had no choice but to write Kathy Heater up, because he had [written] up Beemer," who was another guard. Taylor allegedly said, "he had the Labor Board charges on him, he had to be fair to everybody in the write ups." Sharp responded saying, "fair is fair... each case is different."

Guard Glen Allen testified that in early summer of 2003, he had a conversation with Taylor. Allegedly Taylor approached Allen and said, "they had written Kathy Heater up that day, and that he was going to have to write up all the security personnel because of this Labor Board charge that had been filed." Allen responded saying that he "hated to see that get started."

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[16] I find it necessary to comment that a 40-hour suspension for a guard who intentionally goes to sleep while on duty at the United States Army Ammunition Plant seems to me to be a rather mild penalty. Munitions of various kinds and sizes are apparently produced and stored at the facility. I would certainly hope and expect that at a time of serious danger to the public from potential terrorists, the Respondent's guards would be awake and alert, and there would be few, if any such incidents.

Taylor obviously testified at length, both on direct and cross-examination. However, he never denied making the statements attributed to him by Sharp and Allen. Accordingly, I must assume the conversations occurred as testified to by the two guards. All three conversations constituted clear and unambiguous threats by Taylor to retaliate against the guards, because their Union filed a charge with the Board on behalf of Good. The plain meaning of Taylor's comments was that he would either be issuing discipline or more severe discipline than was warranted to various guards, because the Union had availed itself of the Board's process. Without a doubt, such threats would tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

Accordingly, based on the above, I conclude that the Respondent's conduct, by Taylor's statements made to employees in the latter part of June 2003, constituted a violation of Section 8(a)(1) of the Act, as alleged in paragraph 4(a) and (b) of the complaint.

Earlier in this decision, I noted my conclusion that there was no evidence of union animus by the Respondent. In my view, this was certainly true through the time that Good was suspended. His suspension occurred two months prior to the time Taylor made his threatening statements. Taylor obviously resented the filing of the Board charge on behalf of Good, and he appeared to take the matter personally. In a conversation in late June with David Han, a garage mechanic, Taylor mentioned that Good had "filed charges against me, and has made it personal." Taylor wanted to take pictures of a vehicle that Good had allegedly damaged, apparently as evidence to be used in some future proceeding.

I believe that Taylor's threatening statements were isolated actions, not indicative of the Respondent's attitude in general toward its employees' unions, including the Charging Party. Taylor's statements came several months after Good was last disciplined, and does not alter my conclusion that the Respondent exhibited no union animus, certainly through the period of the discipline and for several months thereafter. Accordingly, I am of the view that it would be inappropriate to retroactively apply Taylor's unlawful statements to the matter of Good's discipline.

D. Summary

As is reflected above, I recommend dismissal of paragraph 5(a), (b), (c), and (d) of the complaint.

Further, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in paragraph 4(a) and (b) of the complaint.

Conclusions of Law

1. The Respondent, Day & Zimmermann Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Government Security Officers of America, Local No. 254, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Threatening to discipline its employees, because the Union filed unfair labor practice charges with the Board; and

(b) Threatening to discipline its employees more severely than is warranted, because the Union filed unfair labor practice charges with the Board.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not committed the other violations of law that are alleged in paragraph 5(a), (b), (c), and (d) of the complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Day & Zimmermann, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Threatening to discipline its employees, because the Union filed unfair labor practice charges with the Board;

(b) Threatening to discipline its employees more severely than is warranted, because the Union filed unfair labor practice charges with the Board; and

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its facility in Parsons, Kansas copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are

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[17] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

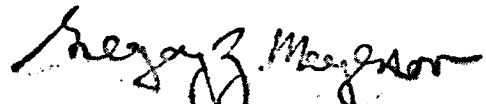
[18] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at San Francisco, California on January 13, 2004.



Gregory Z. Meyerson
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten to discipline you, because the United Government Security Officers of America, Local No. 254 (the Union), or any other union, filed unfair labor practice charges with the National Labor Relations Board (the Board).

WE WILL NOT threaten to discipline you more severely than is warranted, because the Union, or any other union, filed unfair labor practice charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

Day & Zimmermann, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.